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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

JOSEPH F. SCHINDELAR, D.V.M., Petitioner

v.

DAVID L. MICHAUD, ROBERT E. BROWN, HAROLD ERB, and KENNETH T. COLWELL, Administrator of the Estate of ROBERT A. WELSH, Deceased, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in the above case on June 2, 1969.

OPINIONS BELOW

The District Court for the District of Colorado rendered no opinion. The opinion of the Court of Appeals for the Tenth Circuit has not yet been reported.

JURISDICTION

The Judgment of the Court of Appeals for the Tenth Circuit was made and entered on June 2, 1969, and a

copy thereof is appended to this petition in the Appendix at pp. 19-24. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. As a matter of Colorado law, can an arrest without a warrant for a misdemeanor be lawful when an officer does not make the arrest on the spot, but leaves, subsequently returning for a purpose other than to make an arrest?

2. As a matter of Colorado law, can an arrest by an officer in uniform be lawful if, immediately prior to the arrest, the officer disavows the purpose of arresting, and then attempts to effect an arrest, without further notice?

If the Court finds that the Court of Appeals of the Tenth Circuit did not err in concluding that under Colorado law the arrest was unlawful, the following question remains:

3. Is there not an overriding Federal policy, as expressed by the Civil Rights Act, which requires that for the protection of civil rights there be a national standard governing the manner of making a lawful arrest?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of 28 U.S.C. § 1343 (1958 as amended); 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; Colo. Rev. Stat. (1963) 35-5-5, 39-2-20, 40-18-40, 40-18-41 and 40-18-42 and Colo. Rev. Stat. (1963) Chapter 39, Article 14 (The Uniform Act on Fresh Pursuit) are set forth in the Appendix at pp. 24-30.

STATEMENT

This is a Civil Rights Action. It was brought pursuant to Federal Statutes 28 U.S.C. § 1343 (1958 as amended); 42

U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; and C.R.S. 1963, § 35-5-5.

In his complaint, Petitioner alleged violation of civil rights, conspiracy, false arrest, false imprisonment, assault and battery, malicious prosecution, and denial of his rights guaranteed under the V and XIV Amendments of the United States Constitution. Petitioner prayed for damages.

On November 4, 1965, Petitioner, Joseph F. Schindelar, hereinafter sometimes referred to as Dr. Schindelar, was a practicing doctor of veterinary medicine in Evans, Colorado. During recent years, Dr. Schindelar had had certain problems with the Town of Evans involving the sewer, grading of the streets, curbs and gutters, drainage, and other matters. (R. 490-493, 665-667) One of the Respondents, Erb, the Town Marshal, was aware that Dr. Schindelar was angry at the town: In July of 1965, Dr. Schindelar had ceased his practice of taking care of stray dogs brought to his clinic by Erb (also the Town Dog Catcher) (R. 665); previously, Dr. Schindelar had rendered this service to the town free of charge. (R. 663-664)

Respondent Brown, a deputy sheriff in Weld County, also served as a councilman of Evans, and, in this capacity, had charge of streets and alleys, including ditches. At the time of the incident which gave rise to this action, Petitioner was relocating his driveway and some trees. The firm Dr. Schindelar had employed to do the necessary excavation work had deposited the removed earth into a community drainage ditch, or gulch, adjacent to a field across the road from Dr. Schindelar's residence. (R. 708-709) The decision to put the dirt in the ditch was made by Mr. Condreay, the Superintendent of Greeley Excavating Company. Dr. Schindelar had no part in it. Greeley Excavating had put dirt in the ditch on other occasions. (R. 708) When informed of the dirt, Brown sent Erb to the Petition-

er's residence to discuss the problem. (R. 993-994, 1176-1177, 1192) This procedure was contrary to that normally followed by the town. Normally, the six Commissioners talked to a party about a ditch before the Marshal went. (R. 1199-1200) Greeley Excavating was never contacted about the dirt in the ditch. (R. 709)

Upon his arrival, Erb drove the patrol car onto Dr. Schindelar's property. (R. 487, 996) Erb did not have a warrant. (R. 1027) There is a conflict in testimony as to the Marshal's state of agitation. (R. 486-487, 673-674, 996-997) The first statement Erb made was: "Doc, I have bad news for you." (R. 489, 674, 997) Dr. Schindelar advised Erb that he did not wish to speak to him and wanted him to leave his property. (R. 489, 497, 675) Erb stated that he only wanted to talk to Dr. Schindelar. (R. 489, 582, 675) Dr. Schindelar told Erb he was trespassing. (R. 677) There is some confusion as to whether dirt was ever mentioned. (R. 489-490, 498, 997) Dr. Schindelar told Erb that if he did not leave, he would hit him. (R. 497) Erb did not leave and Dr. Schindelar struck Erb. (R. 498) Erb still did not leave and Schindelar swung a second time. (R. 499) Erb retreated to his patrol car and started to call for assistance. (R. 499, 1000) Dr. Schindelar advised Erb that he should remove the patrol car, or Dr. Schindelar would break the windshield with a shovel. (R. 499) Erb did not move the car, and Dr. Schindelar carried out his threat. (R. 499-500) Erb thereupon left the property and radioed the Weld County Sheriff's Office for assistance. (R. 1002-1004) Dr. Schindelar did not pursue him or leave his property. (R. 1025) Brown and Michaud, Deputy Sheriffs on call, responded and met Erb at a service station a few blocks from Dr. Schindelar's residence. (R. 1116-1118)

The incident between Erb and Schindelar had occurred at approximately 5:00 p.m. (R. 1176-1177) Erb, Brown

and Michaud returned to Dr. Schindelar's some thirty to forty minutes later. (R. 595) During the intervening time, there was no attempt to obtain a warrant, to contact the city attorney, or to obtain any advice or legal process. (R. 1027, 1217) Respondents admit that they had no intention of arresting Dr. Schindelar. (R. 1074, 1141, 1198) They had no clear idea what they would do. (R. 1218-1219) Michaud testified that he told Dr. Schindelar that he wanted to talk to him. (R. 1121) Dr. Schindelar asked the Respondents if they had a warrant. (R. 506, 1121) When he learned that they did not, he stated he did not want them to come onto his property without a warrant and did not wish to talk to them. (R. 506, 1165, 1181, 1221) Erb testified that Michaud stated words to the effect of: "We did not come here to arrest you." (R. 1038-1039) Michaud stated he told Dr. Schindelar he was under arrest. (R. 1122) Dr. Schindelar testified he was never told he was under arrest until after he had been carried off his property onto the city street, following the altercation here involved. (R. 511) Some of the testimony of the Respondents agrees with the statement of Dr. Schindelar (R. 1028); some of it indicates that Dr. Schindelar was told he was under arrest before he was removed from his property. (R. 1237) Michaud started to run onto Dr. Schindelar's property. (R. 597, 602) He was followed by Erb and Brown. (R. 601) Dr. Schindelar came off his porch. (R. 506) Schindelar testified that Michaud drew his gun (R. 603-604)—Respondents all deny this. Dr. Schindelar struck Michaud. (R. 605) Michaud grabbed Dr. Schindelar around the waist. (R. 606) An altercation involving all three of the officers and Dr. Schindelar followed, in which Petitioner was severely beaten. He thought he would be killed. (R. 606-609) After about one-half hour of fighting, the officers succeeded in getting Dr. Schindelar out onto the street in front of his property. (R. 511) At this point Schindelar said that he

gave up. (R. 683, 1131, 1187) Schindelar was shoved into the sheriff's car, (R. 685, 686, 706), and taken to the Weld County Jail where he was booked.

Dr. Schindelar was charged with a misdemeanor in Weld County for assault upon an officer and destruction of public property. He was tried for these offenses brought against him by Respondents Michaud and Erb. He was acquitted of the charges. (R. 95)

Shortly after the incident, Dr. Schindelar underwent three periods of hospitalization and for a period of several months was unable to perform work. (R. 535-539) During one of these periods of hospitalization, in January of 1966, he had a testicle surgically removed. (R. 860) In April of 1966 he had surgery on his right knee. Petitioner's medical witnesses testified that the injuries which necessitated the hospitalization dated from November 4, 1965, the date of the incident. (R. 718-719, 758, 860)

In the action brought by Dr. Schindelar requesting damages against the Respondents, the District Court dismissed the claim which had been brought against Sheriff Welsh on the theory of vicarious liability. (R. 979, 1425) The claims of unlawful arrest, false imprisonment, and malicious prosecution were also dismissed by the trial court. (R. 1411, 1412) The trial court ruled as a matter of law that an arrest would have been lawful. (R. 1411) The sole issue which the Court presented to the jury was whether, the Respondents used unreasonable force in making a proper arrest. (R. 1410-1412) The jury entered a verdict in favor of Respondents. (R, 1427)

On appeal, the Court of Appeals for the Tenth Circuit affirmed. In dealing with Petitioner's contention that the arrest was not valid because the officers lacked a warrant, the court decided against Petitioner relying on C.R.S. 1963, §

39-2-20 which authorizes an arrest without a warrant. (Op.* 5, 6) In addressing itself to Petitioner's contention that, even under this statute, the arrest was invalid because of the delay and because there was a break in the chain of events, the Court relied on C.R.S. 1963, § 39-14-5 which defines "fresh pursuit." (Op. 6) The Court stated that Erb did not delay unreasonably before making the arrest and that such delay as there was was used to procure assistance. (Op. 7) The Court did not deal with Petitioner's contention that there was a break in the chain of events and no "fresh pursuit" even though the Respondents admitted they returned to Dr. Schindelar's home without any intention of effecting an arrest.

As to Petitioner's further contention that the arrest was unlawful because he did not have notice of the fact that he was being arrested, the Court noted that there were no Colorado cases which required such notice. (Op. 7) The Court went on to state that upon a review of the general authority, it concluded that notice was not required where the person being arrested knows or ought to know that he is being arrested and why. (Op. 7) The Court then stated that Schindelar admitted he knew that Erb, Brown, and Michaud were officers, and said, "It is inconceivable to us that he did not know why they had returned, he having attacked one of them and knocked out the windshield of his patrol car only a few minutes earlier." (Op. 7) The Court did not deal with Petitioner's contention that Respondents expressed disavowal of any intention to arrest negated any knowledge of intent the law might otherwise reasonably infer.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets Colorado law in the important areas of

*Opinion of the Tenth Circuit Court of Appeals herein.

the manner of making an arrest and the use of a warrant. Further, if the Court of Appeals is correct in its interpretation of Colorado law, important questions are raised as to whether State law should control in this area, in view of the Federal policy expressed in the Civil Rights Act. In either event, this Court should grant review.

1. The Court below erred in concluding that a warrant was not required because the officers were in "fresh pursuit." (Op. 6, 7) The decision of the Court below avoided the question of whether, despite the interval between the act and the arrest, there could be fresh pursuit in a situation in which the officers returned with no intention of arresting but subsequently had a change of mind and effected an arrest. Actually, the Court of Appeals erred in several instances in interpreting Colorado law to justify an unlawful arrest. First, it assumes contrary to the undisputed testimony that Dr. Schindelar removed dirt to the town drainage ditch. (Op. 4) Next, the Court construes Colorado's "anti-litter" law, C.R.S. (1963) § 40-18-41, which makes it unlawful to dump or leave *trash* or *garbage* upon public property or along a public highway as being applicable to *dirt* in a ditch. (Op. 5) No Colorado cases have interpreted this statute thus. Dr. Schindelar was never charged with a violation of it. No reference to Section 40-18-41 or a violation of it is contained in the trial record. Finally, the Appellate Court states that C.R.S. (1963) § 40-18-42 authorized Erb's action as enforcement of Section 40-18-41. (Op. 5) The opinion completely overlooks the specific requirements of Section 40-18-42 that an officer making an arrest without a warrant under C.R.S. (1963) §§ 40-18-40 and 40-18-41 must upon demand immediately take the arrested person before the county court or in the absence of such demand *must prepare a written notice and summons setting forth the charges and the time and place of an appearance before the court*. None of these actions were taken in this case.

As the Court below noted, under Colorado law, an arrest for a misdemeanor committed in the presence of an officer may be made by such officer without a warrant. The opinion cites C.R.S. (1963) § 39-2-30 as justification for an arrest without a warrant. This is obviously a typographical error as the statute quoted is § 39-2-20. The trial court's conclusions, that there was an unjustified assault and battery, a breach of the peace and damage to public property, (Op. 6) are contrary to Dr. Schindelar's acquittal on these charges in the Weld County, Colorado trial. (R. 95, 96) The Weld County decision should be *res judicata* on these points. The Court of Appeals also overlooks the fact that Michaud made the subsequent arrest. Michaud was not present when the initial alleged misdemeanors were committed against Erb. Prior to enactment of Section 39-2-20, Colorado followed the common law rule that an arrest without a warrant for a misdemeanor must be made by the officer in whose presence the misdemeanor was committed; *Newman v. People,* 23 Colo. 300, 47 P. 278 (1896). Judicially, Section 39-2-20 did not change this rule. As a criminal statute, Section 39-2-20 is strictly construed. Despite the fact that *Johnson v. Enlow,* 132 Colo. 101, 286 P.2d 630 (1955), decided after passage of Section 39-2-20, undoubtedly arose prior to enactment of the Section all subsequent annotations of the Colorado statutes cite it as authority for the proposition that arrests without a warrant apply to *felonies* made out of the presence of the arresting officer. In *Lavato v. People,* 159 Colo. 223, 411 P.2d 328 (1966), the Colorado Supreme Court, citing Section 39-2-20 as set out in C.R.S. (1960) Permanent Supplement, there have been no subsequent amendments, specifically stated:

> 1960 Perm. Supp., C.R.S., Section 39-2-20 authorizes an officer to *arrest* an individual *without a warrant* when a *felony* has in fact been com-

> mitted, and the officer has reasonable grounds for believing that the person to be arrested has committed it. 159 Colo. at 226. [Emphasis supplied.]

Although there are no Colorado cases which deal with limitations on the statutory power to arrest, once an "in presence" misdemeanor has been committed, limitations inherited from the common law have consistently been read into the statutes. *Jackson v. Superior Court of Merced County,* 98 Cal.App.2d 183, 219 P.2d 879 (1950) The general rule is:

> . . . once an officer has the right to arrest without a warrant for a misdemeanor or breach of the peace committed in his presence he must do so as soon as he reasonably can, and if he delays for purposes disassociated with the arrest or for such a length of time as to necessarily indicate the interposition of other purposes, he cannot arrest without a warrant.[1]

The cases which have considered the problem of delay have uniformly held that, unless there is good reason to delay, an arrest without a warrant must be made immediately if it is to be lawful. *Jackson v. Superior, supra; Smith v. State,* 228 Miss. 476, 87 So.2d 917 (1956); *Wahl v. Walton,* 30 Minn. 506, 16 N.W. 397 (1883).

> When it is said that the arrest must be made at the time of or immediately after the offense, reference is had, not merely to time, but rather to sequence of events. . . . The officer must at once set about the arrest, and follow up the effort until the arrest is effected. *Wahl v. Walton,* 16 N.W. at 398.

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[1] *Peace Officer's Delay in Making Arrest Without a Warrant for a Misdemeanor or Breach of Peace,* Annotation. 58 A.L.R.2d 1056 (1958).

In those cases which have upheld arrests without a warrant after a delay there has been some justification for the delay, e.g., the need to procure assistance, *Herrin v. State of Alaska,* 449 P.2d 674 (Alaska 1969); or time spent in pursuit, *Curry v. Commonwealth,* 199 Ky. 90, 250 S.W. 793 (1923). *Always,* however, the officer has set about immediately to effect the arrest with the evident intent of making the arrest at the first opportunity.[2]

In the instant case, the actions of Erb were not designed to perform an arrest at the earliest possible moment. Erb had ample time to obtain a warrant but did not do so (R. 1027, 1028). It is true that he obtained assistance but the intent of obtaining such assistance was evidently not for the purpose of making an arrest, since the testimony of all the officers is clear that none returned to Dr. Schindelar's for the purpose of arresting him. (R. 1074, 1141, 1198)

Arrest without a warrant is often desirable to prevent the miscreant from making an escape while the officer is absent to obtain a warrant.[3] However, there is a danger when allowing arrests without a warrant. As the Court stated in *Wahl v. Walton, supra:*

> The power to arrest without a warrant, while it may in some cases be useful to the public, is dangerous to the citizen, for it may be perverted to purposes of private malice or revenge, and it

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[2]The reliance which the Court of Appeals places on C.R.S. (1963) 39-14-5 is misplaced to the extent that it purports to establish a different standard for fresh pursuit. A reading of that section in the context of Article 14 clearly shows that the article addresses itself to fresh pursuit by officers of other states into Colorado or pursuit by county or municipal peace officers across county or municipal lines in cases of moving traffic violations. The definition does not apply to any other situation. Moreover, the term "unreasonable delay" has not been construed by any other court, so the Court of Appeals' reliance here is not unlike a self-fulfilling prophesy: It interprets the law to support its view and then declares its view is supported by the interpretation of the law.

[3]In this case there was no such fear, for Erb left the premises in any case and when he returned, Schindelar had not left his property.

ought not, therefore, to be enlarged. 16 N.W. at 398.

The danger of bypassing the warrant procedure is clear in this case. Since by Erb's own testimony he did not intend to arrest Dr. Schindelar when he returned with Brown and Michaud, neither of whom intended to make an arrest (R. 1077, 1141, 1198, 1220), one must conclude that something which Dr. Schindelar said or did—perhaps Dr. Schindelar's belligerent attitude toward the sanctity of his property—caused a change of mind. The officers seem to have decided to "punish" Dr. Schindelar by "arresting" him and working him over in the process, using the previous offense as an after-the-fact justification. It is unclear what Schindelar could have done to placate the officers so that they would have followed through with their original intent not to arrest, but it is very clear in this case that the power to arrest was used as a club.

The Civil Rights Act becomes a mockery if the Courts permit officers to proceed without due process to harass a party, regardless of his breaking point, into an altercation which they justify as cause for making an arrest for a previous action for which, by their own admission, they had no intention of making an arrest. The prevention of this type of deprivation of individual rights constitutes the basis of this Petition.

The Tenth Circuit, in upholding the arrest in this case where the officer "changed his mind," has expanded the officer's right to arrest without a warrant. Bypassing the warrant procedure when there is no need therefor exposes the citizen to the danger of arbitrary police behavior while yielding no countervailing social benefits. Petitioner asks this Court to review this inroad into the arrest without a warrant procedure.

2. The Court below, in holding that the arrest was not

invalid for want of notice to Dr. Schindelar that he was being arrested, seems to recognize the principle that a person must be advised that he is being arrested unless he has reason to know that he is being arrested. (Op. 2) The Court below then goes on to say that Dr. Schindelar did have such notice.[4]

The preponderance of the testimony established that Dr. Schindelar was not told he was under arrest. (R. 511, 598, 1028) In fact, the weight of the testimony indicates that he was explicitly told he was not under arrest.[5] (R. 1038, 1039)

Since the issue of notice was not presented to the jury and no findings of fact were made in this regard, the ruling of the Court of Appeals amounts to a holding that a man is charged with notice that he is to be arrested, even in the face of *express statements* to the contrary, when he has allegedly committed a misdemeanor and is approached by an officer.

The Restatement of Torts, Section 128 sets forth the general rule that under most circumstances an officer must manifest his intent to make an arrest. As the Court of Appeals noted (Op. 7), there are no Colorado cases which adopt this rule, but that is because this issue has never been presented. This is the rule in most jurisdictions. 5 Am. Jur. Arrest Section 70 p. 756. In the case at bar, there is ample testimony that the officers expressly disavowed any intention to arrest. Without a later statement to the contrary, it was perfectly reasonable for Dr. Schindelar to take the Respondents' words at face value and to assume that

[4] "It is inconceivable to us that he did not know why they had returned, he having attacked one of them, and knocked out the windshield of his patrol car only a few minutes earlier." (Op. 7)

[5] Michaud's testimony (R. 1122) is to the contrary, but it is unsupported, in fact contradicted (R. 505, 511, 683, 684, 1039, 1078, 1237), and in any case, the issue was not submitted to the jury so the Appellate Court cannot be relying on this testimony.

Michaud's abrupt entry onto Dr. Schindelar's property (R. 597, 602) was not pursuant to an arrest but rather, was an attempt to get even with Dr. Schindelar by resorting to extralegal means. Dr. Schindelar reacted accordingly, and attempted to expel the intruder. The ensuing skirmish led to this case.

The danger of upholding this kind of arrest is clear:

(1) Notice acts to protect both the citizen and the policeman, for in the absence of this notice the person to be arrested could misinterpret the attempted arrest as an assault, and offer forceable resistance. LaFave, *Arrest* (1965) 219. Even assuming that the officers in this case did not act maliciously, and honestly changed their minds and decided to arrest the Petitioner without so informing him, it is hard to fault Dr. Schindelar on his reaction. The mere fact that a man is in uniform does not make him physically incapable of an illegal assault. Here the officers expressly disavowed any intention to arrest and then Michaud abruptly entered upon Dr. Schindelar's property and charged toward him in a menacing way (R. 507, 508). Absent some notice at this time that Dr. Schindelar was under arrest, and in view of the fact that the relations between the town and Dr. Schindelar had been strained of late, and in view of what had occurred less than an hour before, was Dr. Schindelar's inference that he was being attacked unreasonable—as a matter of law? A requirement that the officers manifested a change of intent, if indeed there was one, would have served to protect all parties, and this is the purpose of the rule requiring notice. LaFave, *Arrest*, supra.

(2) Moreover, requiring notice would serve to protect the rights of citizens in another respect. It is possible on the facts of this case to conceive that one or more of the officers decided to bait Dr. Schindelar into a fight. This

plan could take the form of disavowing any intent to arrest; provoking Dr. Schindelar by intruding onto his property against his expressed wishes. (R. 506, 1165, 1181, 1221); precipitating a fight with Dr. Schindelar and beating him up in the process to "get even"; and then justifying it all by saying that Dr. Schindelar was forceably resisting a lawful arrest. To uphold an arrest such as the one in this case, where there was no notice of intent to arrest (in fact expressed notice to the contrary), places in the hands of police officers a weapon which can be used as an after-the-fact justification of highly undesirable police behavior.

This is not the sort of discretion which has ever been granted to the police and Petitioner contends that if the issue were presented in Colorado, on the facts herein explicit notice of intent to arrest would be required. Petitioner therefore submits that the Court of Appeals for the Tenth Circuit erred in holding that the arrest was valid as a matter of law.

Because the decision of the Court below will have an enormous impact on arrest procedure and because arrest procedure is a most sensitive area in the relations between the police and the community, Petitioner asks that this Court review the decision of the Court below.

3. In the event that this Court decides that the Court of Appeals for the Tenth Circuit was correct in its interpretation of Colorado law, there remains a further question as to whether Colorado law as so construed is compatible with the Civil Rights Act, and if not, whether state law should control in this area of federal concern.

This Court in *Beck v. Ohio,* 379 U.S. 89 (1964), recognized the need for a uniform standard for determining the constitutional validity of an arrest. Quoting with approval from *Brinegar v. U.S.,* 338 U.S. 160 at 176, there this Court said:

> The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice. 379 U.S. at 91.

This Court in *Beck* also recognized the desirability of the warrant procedure saying:

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. 379 U.S. at 96.

Petitioner does not contend that the manner of making an arrest is as important as the grounds upon which an arrest can be made. This is simply because the class of persons affected is smaller. Only those individuals with respect to whom probable cause exists would be affected by the arrest procedure. If there were no probable cause standard, however, conceivably every citizen, no matter how innocent, could be subject to arrest at the whim of a police officer.

There are, however, some parallel interests which this Court should consider. The Civil Rights Acts were aimed, in part, at curbing the arbitrary use of power possessed by virtue of state law and made possible because the wrongdoer is clothed with the authority of state law. *Davis v. Johnson,* 138 F. Supp. 572 (N.D. Ill. 1955). When police officers are given wide latitude in the manner in which they

can legally effect an arrest, they are given a means of acting capriciously. In the instant case, because the officers involved were not required to obtain a warrant, and were not required to announce to the Petitioner that they were placing him under arrest, they were allowed to withhold arrest or arrest at their pleasure, pending some act of Petitioner. Then, because Petitioner's attitude annoyed them, they could bait him into a fight to later justify an "arrest." By requiring a warrant, much of an officer's discretion in deciding when, and whether or not, an arrest is to be made would be curbed. Spur of the moment, unjustified, emotional acts would be curtailed. By requiring notice of intent to arrest, both the officer and the citzen would be protected from an unfortunate misinterpretation of the officer's act as an assault. The citizen who had committed a minor offense would be protected from an officer's baiting him into a fight, then justifying it after-the-event as reasonable force incident to an "arrest."

This Court has recognized the importance of controlling police discretion in the matter of grounds for arrest. *Beck v. Ohio, supra.* Even though probable cause may exist against a person, he has not been convicted and is entitled to the protection of his civil rights. Allowing state law to control in the area of arrest procedures could in substantial measure violate the Civil Rights Act.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 10056 — MAY 1969 TERM

JOSEPH F. SCHINDELAR, D.V.M.,
Appellant,

v.

DAVID L. MICHAUD, ROBERT E. BROWN, HAROLD ERB, and KENNETH T. COLWELL, Administrator of the Estate of ROBERT A. WELSH, Deceased, Appellees

Appeal From The United States District Court For The District of Colorado (Dist. Court No. 66-C-581).

Robert C. Hawley, Denver, Colorado (Ireland, Stapleton, Prior [sic] & Holmes, and Kenneth L. Starr, Denver, Colorado, with him on the Brief), for Appellant.

Walter A. Steele, of White and Steele, Denver, Colorado, for Appellees.

Before BREITENSTEIN, SETH, and HICKEY, Circuit Judges.

SETH, Circuit Judge.

Appellant instituted this suit pursuant to 42 U.S.C. § 1983 to recover damages from appellees who are peace officers for assault and battery, false arrest, false imprison-

ment, and malicious prosecution, all in violation of appellant's fifth and fourteenth amendment rights. The trial judge ruled that the appellees in arresting the appellant had acted legally and submitted to the jury the question of whether unreasonable force was used in effecting the arrest. The jury decided that there had not been any unreasonable exercise of force.

The plaintiff-appellant has brought this appeal, contending that the trial court was in error when it determined that the arrest was legal. It is appellant's position that the question of whether the arrest was legal should have been submitted to the jury for their determination. Moreover, appellant contends that his cause of action against the estate of Sheriff Robert A. Welsh, deceased, should not have been dismissed.

The dramatis personae and events which motivated the suit can be generally described as follows: Appellant practiced veterinary medicine in Evans, Colorado, and had in times previous to this incident enjoyed a cordial relationship with the officials of the community. He had, as an accommodation to the community, boarded stray dogs free of charge at his animal clinic. However, due to disputes over drainage and the grading of the road in front of the appellant's home and business, the relationship between appellant and the community officials had deteriorated.

At the time of the incident which gave rise to this action the appellant was relocating his driveway and some trees. The person he had employed to do the necessary excavation work had deposited the extra earth which had to be removed in a community drainage ditch across the road from the appellant's residence. This fact was related to appellee, Harold Erb, the then town marshal of Evans, who drove to the appellant's residence to discuss the problem of where the excess dirt was being placed. On his arrival at appel-

lant's place, Mr. Erb drove onto the appellant's property in his patrol car. There is a conflict in the testimony as to the marshal's state of agitation, but it is conceded that the appellant thereupon ordered him off the property. The marshal pointed out that he was there only to discuss the matter of where the dirt was being placed but appellant again ordered him off the property, then struck Erb in the face, and then struck him a second time. Erb retreated to his patrol car, and sought to radio for help. At this point, the appellant took a shovel and smashed out the windshield of the patrol car. Erb left and called for the assistance of the Weld County sheriff's office. Deputy sheriffs Robert Brown and David Michaud, appellees herein, responded to the call for assistance and met with Erb at a service station a few blocks from the appellant's residence. The three men returned not only to discuss the problem of the earth removal, but also the incident of the broken windshield. Again there is conflict in the evidence as to exactly how the arrest was effected; but after a scuffle, appellant was subdued and taken to the county sheriff's office.

Appellant's first contention is that Marshal Erb had no right to enter upon his property in the first instance, and that therefore appellant was entitled to use any reasonable amount of force to evict him as the marshal was no more than a trespasser. It must be conceded that the reason Marshal Erb went to the appellant's residence was for the purpose of discussing the matter of the appellant's removing the dirt to the town drainage ditch. Colo. Rev. Stat. '63 § 40-18-41 makes it unlawful for any person to dump or leave trash or garbage upon any public property or along any public highway in the state, and section 40-18-42 also authorizes any peace officer to enforce its provisions. We must conclude that Mr. Erb as a police officer and town marshal had authority to go upon the appellant's property since he was engaged in the performance of his official

duties. He was therefore not a trespasser. Clews v. People, 377 P.2d 125 (Colo. 1962); Walker v. Tucker, 280 P.2d 649 (Colo. 1955); Lunt v. Post Printing & Publishing Co., 110 Pac. 203 (Colo. 1910). It may also be observed that even if the above were not the case, as Judge Doyle concluded, the appellant certainly employed unreasonable force in evicting Erb in twice striking him and then smashing out the windshield of his patrol car.

It is appellant's second contention that when the three appellees, Erb, Brown, and Michaud, later returned, they could not effect a legal arrest inasmuch as they lacked a warrant, and they were not in "fresh pursuit" of a person they knew to have committed a crime.

By section 39-2-30 of Colo. Rev. Stat. '63, it is provided that:

> "An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed in his presence; and by an officer when a criminal offense has in fact been committed; and he has reasonable grounds for believing that the person to be arrested has committed it."

The trial judge concluded that the appellant's attacks on Marshal Erb constituted an unjustified assault and battery in the first instance. Subsequently Erb witnessed a breach of the peace and damage to public property when appellant smashed out the windshield with a shovel. We agree with the trial judge that in the light of such events, the marshal need not have obtained a warrant.

Appellant however argues that even if the marshal may not have been required to obtain a warrant at the time of the first altercation, his leaving to get the assistance of the two deputy sheriffs and returning forty-five minutes later

constituted such a break in the chain of events that at that time he would have been required to have had a warrant. Colo. Rev. Stat. '63, § 39-14-5, which defines "fresh pursuit," has as its last sentence, "fresh pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay." In reading this statute, and in reviewing the cases cited by appellant on the question of "fresh pursuit" (and which incidentally stand in the main for the proposition that the arrest need not be immediate but concede that considerable time may be needed to procure necessary assistance), we conclude that appellees Erb, Brown, and Michaud had probable cause to arrest the appellant, acted without unreasonable delay, and thus a warrant was not required.

Appellant also contends that his arrest was unlawful because he was not advised that he was being arrested and the reason for the arrest. Appellant is unable to cite any Colorado authority which supports such a proposition. Moreover, in reviewing the general authorities cited by the appellant that relate to this proposition, we find that they hold that a person must be advised that he is being arrested and the reason therefore unless that person either knows or has reason to know that he is being arrested and why. Appellant admitted that he knew Erb, Brown, and Michaud were officers. It is inconceivable to us that he did not know why they had returned, he having attacked one of them and knocked out the windshield of his patrol car only a few minutes earlier.

It is unnecessary for us to reach the question of whether the trial court properly dismissed the complaint against the administrator of the estate of Robert A. Welsh, former sheriff of Weld County. The decision of the jury as to the liability of the appellees Erb, Brown, and Michaud was adverse to the appellant, and therefore the appellant was

in no way prejudiced since the only way Sheriff Welsh could have been held liable was vicariously.

AFFIRMED.

28 U.S.C. § 1343 (1958 as amended)
Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985
Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citzen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986
Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

1963 C.R.S. 35-5-5
Deputies—liability of sheriff

Each sheriff may appoint as many deputies as he may think proper, for whose official acts, and those of his undersheriff, he shall be responsible, and may revoke such appointments at his pleasure. Persons may also be deputized by such sheriff or undersheriff in writing, to do particular acts, and the sheriff and his sureties shall be responsible on his official bond for the default or misconduct of his undersheriff and deputies.

1963 C.R.S. 39-2-20
Arrests without warrants

Any provision in this chapter prior to the effective date of this section to the contrary notwithstanding, an arrest may be made by an officer or by a private person without warrant, for a criminal offense committed in his presence; and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has commited it.

1963 C.R.S.
Article 14

39-14-1. Foreign officer may make arrests.—Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

39-14-2. Hearing—lawfulness of arrest.—If an arrest is made in this state by an officer of another state in accordance with the provisions of section 39-14-1, without unnecessary delay, he shall take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state, or admit

him to bail for such purpose. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

39-14-3. Construction.—Section 39-14-1 shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.

39-14-4. State defined.—For the purpose of this article the word state shall include the District of Columbia.

39-14-5. Fresh pursuit defined.—The term "fresh pursuit" as used in this article shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

39-14-6. How article cited.—This article may be cited as "The Uniform Act on Fresh Pursuit."

39-14-7. Pursuit across county or municipal lines.—Any member of a duly organized county or municipal peace unit within the state of Colorado, who enters a foreign municipal or county jurisdiction within this state in fresh pursuit of anyone who has committed or is committing or is believed by such member of a peace unit to have committed or to be committing a moving traffic violation, and continues within the foreign municipal or county jurisdiction in fresh pursuit of such person in order to arrest or serve him with a traffic summons on the grounds that he has committed or is believed to have committed a moving traffic violation within the municipal or county jurisdiction of the pursuing member of the peace unit, shall have the

same authority to arrest or serve said person with a traffic summons as has a member of any duly organized municipal or peace unit within his own jurisdictional boundaries.

1963 C.R.S. 40-18-40

Dumping trash on private property—penalty.

It shall be unlawful for any person to dump or leave trash or garbage on any private property, without the owner's consent; provided, that nothing in this section shall be construed as affecting authorized collections and dumping of any trash or garbage. Any violation of this section shall be punishable upon conviction by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days in the county jail.

1963 C.R.S. 40-18-41

Dumping trash on public property—penalty.

(1) It shall be unlawful for any person to dump or leave trash or garbage on any public property or on or along any public highway in the state; provided, that nothing herein shall be construed as affecting authorized collections and dumping of such trash or garbage.

(2) Any violation of subsection (1) of this section shall be punishable by ~~a fine~~ of not more than one hundred dollars or by imprisonment for not longer than thirty days.

(3) The department of highways shall construct and erect at suitable places on the state highways in this state, signs which shall advise the public of this section number and which shall state that dumping trash on or along state highways is prohibited, and, in addition, shall set forth the maximum penalty for a violation of this section.

(4) It shall be presumed that the driver of a motor vehicle from which any trash or refuse is discharged was the person discharging such trash or refuse and he shall be

punished in accordance with the provisions of subsection (2) of this section.

1963 C.R.S. 40-18-42

Enforcement of sections relating to dumping of trash.

The director of the game, fish, and parks department and every duly authorized warden or conservation officer of said department, and every Colorado state patrol officer or patrolman, every sheriff, and any other peace officer in his respective jurisdiction, is authorized and required to enforce the provisions of sections 40-18-40 and 40-18-41, and he shall have full power and authority to arrest, with or without a warrant, any person whom he has reason to believe is guilty of violating either of said sections 40-18-40 and 40-18-41. Whenever a person who has been arrested pursuant to the foregoing provisions demands an immediate appearance before any court, such person shall be immediately taken before a judge of the county court within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense; but should such person so arrested not so request an immediate appearance before a court, then the arresting officer shall prepare a written notice and summons to appear in court, which written notice and summons shall contain the name and address of such person, the offense charged, the time and place when and where such person shall appear in court, and a place for such person to execute his written promise to appear at the time and place indicated on the notice and summons. The foregoing provisions of this section shall govern all law enforcement or peace officers in making arrests without a warrant for violations of sections 40-18-40 and 40-18-41, but the procedure prescribed in this section shall not be exclusive of any other method prescribed by law or the Colorado rules of criminal procedure for the arrest and prosecution of a person for any misdemeanor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents pray that the Petition for Writ of Certiorari be denied.

The facts of this case are accurately set forth in the opinion of the Court of Appeals for the Tenth Circuit. Petitioner, plaintiff in the trial court, has construed the facts in the light most favorable to himself in a case involving highly disputed evidence after the jury has found in favor of Respondents, defendants in the trial court. This is a simple case involving the question of whether or not police officers used excessive force in making an arrest. The facts as to the force used were in direct conflict and these conflicts were resolved by the jury in favor of the officers.

Significantly Petitioner admits that before the arrest he struck officer Erb twice and smashed the windshield of the patrol car with a shovel (Petition for cert. 4 and 21). Officer Erb then obtained help from two more officers, returned to Petitioner's residence where, though the evidence of what happened then is in direct conflict, another scuffle ensued and the plaintiff was arrested. The jury decided that the officers had exercised reasonable force in making the arrest. The Court of Appeals affirmed.

The facts have been heard and decided by the jury and have been reviewed by the trial court and the Court of Appeals. There is no reason for this Court to review this case.

Respectfully submitted,

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